DETERRENT PUNISHMENT.

THE nature of legal punishment has been so frequently discussed that the subject has lost something of its original freshness, yet the difficulties that surround it, and the importance that attaches to it, were never more clearly appreciated than now. The general features of the problem are easily understood. There are certain ends which legal punishment seems to effect, or to aid in effecting, and these may be regarded as principles which, so far, regulate its use. The end may be conceived as deterrent, in the sense in which we shall use that term,—to deter others from committing the crime for which the criminal is seen by society to suffer. Or it may be reformatory, to improve the morals of the sufferer. Or it may be preventive, in the sense of placing the criminal in such a position as to render it impossible for him to repeat his offence,—perhaps for a long time, perhaps forever. Or it may be vindictive, to execute vengeance against him. Or it may be to satisfy some claim of abstract justice which society conceives itself to possess, and, of course, is not admitted to be the outcome of vindictive animosity. These and other ends suggest themselves, some of them perhaps merely to be rejected as inadequate to afford any explanation of the problem, but most of them as undoubtedly real factors in social life. And, accordingly, the popular view seems to be that they all represent some aspect of the truth; so that, to find a connection between them, to pass from this or that theory of punishment to a theory which will hold good generally, is the second phase of the problem, which is infinitely more difficult than the first.

Now, it may be maintained that the spirit of modern times has obviously passed beyond a merely vindictive principle of punishment; indeed, revenge is not punishment at all. Historically, the elaboration of instruments of vengeance may be interesting in this connection, but theoretically it hardly concerns us. The repression of the criminal's freedom, again, is

mainly of importance in its bearing on the conceptions of the new school of criminology. To this subject we shall return, but it may be passed over until we have considered the more orthodox points of view. If, then, we seek to determine the question in what is generally called the practical way, which means that the idea of abstract justice is too vague and metaphysical to be of much value, we are left with the two main objects of reforming the criminal and of deterring others from crime. And, when these two ideas are set against one another in the political arena, victory is almost certain to be with the latter. The reformation of the criminal is rather a moral than a legal or political aim. On the other hand, to deter from crime is of the utmost political importance, and, as a matter of fact, we believe that our punishments do, to a large extent, work out their aim in that way. At any rate, the deterrent end appeals very strongly to common sense. And so the deterrent end itself must be made a matter of investigation. The effect of the punishment of the criminal on society in general, and on the criminal class in particular, can only be tested by experience, and every method of deterring must have its limits and modifications. One axiom generally accepted, however, even by conservatives in such matters, is, that while the deterrent effect of punishment is not necessarily increased by an increase in severity, it depends largely on the absolute accuracy with which it is administered. That he should be sent to prison when he is caught in the act is a fact which the burglar accepts as part of the law of nature. It excites no animosity in his mind. But that he should be always caught is a condition under which his business cannot possibly be carried on.

But, admitting the force of deterrency from the practical point of view, it is often argued that this gives no answer, explicitly at least, to the question why the State should punish at all. It does not explicitly satisfy the demand for justice. Can we unite the idea of social justice with that which we have been considering? Can we dominate the whole with an idea of retribution, or of penalty, which shall give it a logical basis? A well-known answer is, that in punishment

the criminal's own act is seen returning on himself. The punishment of the criminal is just, because it expresses his own will as a rational being; for in his act is involved a universal element which by the act is set up as law. In punishment, which is, as it were, the injury of an injury, he receives his right. On the other hand, the reply which is made to such a line of argument is equally well known. We hear that retributive punishment is a mere phrase; a logical subtlety which, if it can do no harm, can at the same time do no good. It moves in a circle beyond the actual, and can never reach a concrete punishment at all. It seems very desirable, however, to bring the edges of the two theories together; to satisfy justice and yet not lose hold of the generalizations of experience. For, undoubtedly, it is difficult to believe that retributive justice is simply a combination of reformation and deterrency with a dash of vindictiveness thrown in. We may advance some way towards our object by considering a particular penalty, not as an isolated occurrence, but as part of a permanent system which exists in the State. The existence of this permanent system requires, perhaps, to be emphasized. The inter-relation of rights soon becomes obvious when we consider particular rights reflectively, and the systematic basis of punishment would be more often thrust into prominence by juridical writers than it is were it not for the fact that our present punishments are not nearly so systematic as we feel they ought to be. Hence, although we often hear criticism directed against the want of system in our punishments, the fact which that want reveals, the systematic nature of punishment, tends to be forgotten. Of course it may be readily admitted that a kind of systematic treatment is conceivable which is by no means desirable. To make punishment too rigid, to determine all its details by inflexible rule, to destroy that consideration of the particular circumstances of the case which at present in some degree animates it, would be a loss and not a gain. Nevertheless, a permanent system must be assumed; and if we conceive of the criminal as deliberately placing himself in conditions which, by the movement of society,—the same society which guarantees him liberty,—

necessarily result in his punishment, then we can conceive of his act as returning upon himself.

The conception of justice implied in such a phrase as the "justice of punishment" may be treated in many ways. Green's view of just punishment will suggest itself. The conception of the just, according to him, means that complex of social conditions which for each individual is necessary to enable him to realize his capacity for contributing to the social good. And the future maintenance of right must require that the criminal should be dealt with as he is in the punishment. But the precise form of words is, in our opinion, quite unimportant. However we may phrase it, when we are called upon to cross the line from justice to threats, we can only do so by following the tendency which leads us to break up legal life into a complex of rights—to break up our social environment into a complex of social conditions—and to regulate our punishments in relation to those rights, mainly by their deterrent effect. If this involves the abandonment of any synthesis with the true idea of justice, then deterrent punishment must be treated on that basis. The threat, however, always appears to be something more than a threat; it is a social threat, directed primarily against all; it involves an appeal to the conviction, or inference, that the soul of society is just, that the criminal is social.

The fact is that any conception of justice which we may form for working purposes has a necessary relation to life as we are living it, and to society as we find it, that forces us to fill up our ideal with a certain amount of detail which it may be difficult to justify from a merely abstract point of view. Conditions are assumed which, although relatively permanent, need not always wear the same aspect; and this tends to make us emphasize the contrast between abstract justice and concrete justice as embodied in the institutions of our time; between the abstract right to punish and such an explanation of justice as has been suggested. But the right to punish is, after all, an abstraction. If, for the time being, we look upon the social organism as complete and whole, then that system of punishment which the maintenance of its rights

demands is just. And if, on the other hand, we deny this conclusion, because it attributes a false completeness to the social organism, then we must fall back upon the idea of such justice being merely an expression of intrinsic justice. But in that case it is not legitimate to contrast the right to punish, as if it were something beyond the sphere of social life, with our interpretation of social justice. They both suffer from the same defect.

The general relation between the deterrent and the reformatory aims seems, in the popular estimation, to be more easily determined. If it is not the business of the State to seek active methods of promoting private morality, it is also unnecessary for it to attempt actively to effect the moral reformation of the criminal. But it ought, at least, not to hinder his reformation. A punishment which renders reformation difficult is, therefore, generally considered not desirable; but the reformatory end is the subordinate one. Whether this argument affords a valid objection to capital punishment is a matter of dispute. If we substitute repentance for reformation, it apparently does not; and it seems reasonable that the reformatory end should only be allowed to enter into our calculations when it does not conflict positively with the larger ends.

Two principles of practical interest should be noted, as they form a basis of many of the maxims which are believed in by upholders of deterrency. The first is, that although punishments should terrorize, they should not brutalize. Thus, it may be maintained that, relatively, the punishments of death and imprisonment as practised among us do not have a brutalizing tendency, and that punishment by mutilation or torture would. On the border line we may place flogging. Again, it is well known that in civilized communities certain forms of crime linger, or perhaps break out, in certain localities when the rest of the community is comparatively free from them. These are generally of a brutal class, such as assaults on women and children. The true causes of these phenomena have perhaps been overlooked, but there is undoubtedly a tendency to deal sharply with such crimes,

and even to advocate the employment of coarser methods of punishment for them than would be sanctioned elsewhere. The argument is, though its validity may be doubted, that a mild use of coarser methods is more effective in such special cases, and therefore, in the long run, more merciful. In the second place, however, we must avoid making crime romantic. Any method of punishment which excites morbid sentimentality is an evil. There appears to be a class of persons who are eager to see romance in crimes of every description; nor can we allow the fact that they are numerically weak in proportion to the whole population, to blind us to the consideration that they are frequently living on the border line between criminality and non-criminality, and therefore specially capable of being influenced the one way or the other.

Such ideas are commonplace. In the views to which the members of the school of criminologists popularly known as Italian have given expression we may find an interesting contrast. Here an attempt is made to correct the whole theory of criminal law by means of scientific results. It is difficult, indeed, to characterize the movement generally; for the value of it, like that of all similar movements, lies largely in principles which must be worked out through relative antagonism and amid much discussion. Different views are necessarily taken of the value of existing criminal systems, and the adoption of new stand-points is constantly being advocated. For it may be admitted that the results of anthropological and sociological investigation must be brought to bear on the practical problems of crime, and that punishment, though one instrument, is by no means the only instrument, for social defence, without much positive progress being made. The Honorable Oliver Wendell Holmes, in speaking of the movement at the dedication of the new hall of the Boston University School of Law recently, referred to the well-known formula, that we must consider the criminal rather than the crime, and proceeded to point out that there was weighty authority for the belief that not the nature of the crime, but the dangerousness of the criminal, must form the only legal criterion. This summary, perhaps, may lead us to ask ourselves how far every

form of compromise must be rejected as antagonistic to the new spirit,—an important question. Again, Professor Lioy, of Naples, in his general account, emphasizes the stress now laid on the *incorrigibility* of the criminal; and the partial reaction which has set in against the older phases of the movement is well represented by the works of Signor Alimena, now being published at Turin.

We must focus our attention, however, and we shall do so by directing it to Professor Ferri's position, which the English edition of his "Criminal Sociology" has brought into prominence. According to him, the criminal types are five in number,—criminal madmen, born criminals, criminals by contracted habits, occasional criminals, and criminals of passion; a scheme evolved, in a measure, from the twofold division of habitual and occasional criminals with which we are familiar. All the chief classifications of criminals may, he maintains, be brought into line with his own, which gives a more general value to his results. There are three strata in society, again, from his point of view. The first, the highest, is composed of persons who are organically upright and commit no crimes; the second is the lowest and the nursery of born criminals, for whom no punishments, so far as they are legally deterrent, are of value; and the third is formed by the class of persons between the two, who can be deterred and for whom punishment is psychologically useful. Thus the territory is marked out for scientific workers. But, coming closer to legal categories, we may ask, What is his conception of the efficacy of punishment? It is that punishment, as a means of repression, possesses essentially a negative value, because it has not the same influence on all anthropological types of criminals, and because its use is mainly to preclude the serious mischief which would result from impunity. "Impunity would lead to a demoralization of the popular conscience in regard to crimes and offences, to an increase of the profound lack of foresight in criminals, and to a removal of the present impediment to fresh crimes during the term of incarceration" (p. 109). This attitude is one which may be adopted by all, and the definition of it constitutes one of the most interesting portions of the

book. True, we may dissent from the statement that "the least measure of progress with reforms which prevent crime is a hundred times more useful and profitable than the publication of an entire penal code" (p. 135) as savoring of exaggeration; but the point, after all, is not of vital importance, because we desire both remedies, the one without prejudice to the other.

Keeping to the legal side of the subject, however, we find that the most important conception put forward is that of *indeterminate punishment* (p. 207). In its most moderate aspect the scheme proposes that, although punishment should be made indeterminate, it should only be so relatively; that is to say, a maximum and minimum of punishment should be fixed in the sentence. The more thorough-going innovators, however, desire that punishment should be at first quite indeterminate, and should be rendered definite in successive steps by persons qualified to judge how the criminal progresses. The first proposal is made as a sort of compromise with the older system, and, in my view, might well be supported. It leaves the law with much of its present publicity, dignity, and openness of method. On the other hand, it is maintained that such a compromise is quite impracticable, and the conception of indeterminate segregation, as Professor Ferri would have it, is that, when the conditions of the criminal and of his act show that reparation by itself is not sufficient, the judge should only have to pronounce an indefinite detention in the lunatic asylum, the prison for incorrigibles, the penal colony, or such an institution; then permanent commissions would see to and determine the successive steps by which the offender was detained; and thus, it is argued, the oblivion which follows the convict on conviction under the old system would be satisfactorily obviated.

Again, following this principle of indefinite segregation, there is the principle of indemnification, which may take two forms,—of a fine payable to the State or of reparation to the injured persons. As regards the latter, the State is to indemnify the injured person and recoup itself from the criminal. Thus, if society is applying the principle that the individual

ought always to be held responsible for his crimes, it is also applying the counter-doctrine that he ought always to be indemnified for the crimes of which he is a victim. So, at least, runs the argument. Here we find, in a measure, the healing up of the old division between public crime and private injury, and an apparent return to the ideas of the past. A measure which would involve the criminal indemnifying his victim, or something similar, has often been advocated from the more strictly juridical point of view, and its practical end recommends it to a class of students by whom indefinite punishment, or at any rate the thorough application of the idea, would, on account of its vagueness, want of power to grip the public mind, and liability to corrupt influences, be condemned. The question of how to make the criminal more profitable to society than he is is a very important one. It is succinctly treated in an article in this JOURNAL for October, 1891, by Dr. Tönnies, of Kiel, in which a moderate view of criminological reform is persuasively presented.

Lastly, the means of defence must, according to Professor Ferri, be worked out in relation to the various criminal types; and here, in his view, a distinction must be made between the proposals before us and the so-called individualization of punishment which prison experts have advocated in America, as the latter idea is impracticable.

It would be useless even for the members of the classic school to deny that in the details of punishment—on the question of form—many instructive ideas are being put forward, and that experiments are being made in America and elsewhere which are of the utmost importance. The difficulties which attend prison administration seem to be great. In providing suggestions and facts which may lead to a better penal organization in detail probably the most useful work of the new movement will be found. Where the defects of that organization lie and how they are to be remedied are questions which can only be solved by much patient work, and every investigation which keeps the facts well in line is a step in the right direction. But in estimating the value of the progress which has been made and is embodied in existing

institutions, and in preparing for the future, the difficulty of the subject, especially as regards types, must not be forgotten. "Of all the problems which the human race has had to confront," says Dr. Hunter significantly, in his "Roman Law," "the greatest, perhaps, is to know what conduct is really injurious to mankind and what is the best way to secure good conduct. Scarcely less important is it to know the degree in which conduct is injurious. On all these points early societies had everything to learn."

On the other hand, whether the best arguments which can be brought forward for or against such an institution as trial by jury (which Professor Ferri attacks) are not so general in their nature as to fall beyond the scope of a special criminal science has to be considered. As regards lawyers as a class, they assuredly have no sentimental attraction for this form of trial. The old quarrel between the poets and the philosophers is as nothing compared to the old quarrel between the amateurs and the professionals. But if a Churchman could maintain that he would rather see England free than England sober, the lawyers must be allowed the opinion that they would rather that the people should feel that they were free than that they should have the highest possible refinement of judicial justice.

The most sensational question which occurs in this connection is, perhaps, that of capital punishment, to which we have already referred. Even Professor Ferri admits that it has been exhausted from the intellectual stand-point and has passed into the region of prejudice. As an instrument of elimination capital punishment is of no practical value, and popular opinion will never allow it to become so. It is probably as a means of terror that it must stand or fall. No doubt there is an air of poetical justice about it, and no doubt it seems to embody, for some minds, the power of the law; but a further question is, whether it does adequately deter those whom it is meant to affect directly. The latter point is doubtful. Its usefulness, if it is useful, seems rather to lie in its indirect effect; it forms, as it were, the culmination of the penal system; it proclaims that not even life itself will be re-

garded as sacred in those who utterly outrage society. And in any country where its employment, though authorized, is systematically evaded it is useless.

The criminal law—to gather up our criticism—must, before all things, be a workable system, and to render it workable regulations and conceptions have to be acted on which are not so exact as, ideally, we might desire. Analytical distinctions have to be introduced,—notably the distinction between the ordinary and the abnormal man. This is the real rock of offence to the upholders of the existence of graduated criminal types. The distinctions which the law upholds may be seen to have been treated too absolutely when we have advanced a stage in general progress. The tendency of the reformer is always to urge that new and apparently more refined distinctions be substituted for those formerly employed; and he is right in doing so provided the social organization can really apply the new methods. Even then, however, it is unnecessary to be uncompromisingly severe on the past. Now, the principle of indeterminate segregation in accordance with criminal types is one which it is very difficult to judge as such, but it is not unreasonable that it should excite our fears. The scientific spirit is bold and uncompromising. The modern world will never tolerate a court which pretends to sit in judgment on men's mere thoughts as opposed to their actions. But is it possible that we could tolerate a court which, even in a qualified way, sat in judgment, not upon men's thoughts, but upon their mere dispositions and tendencies? That is the danger, although it seems probable that the fixing of a maximum and minimum of punishment in the sentence would practically do much towards obviating it. And, whether this be so or not, it can hardly be disputed that the idea of indeterminate punishment, in some form or other, is becoming more and more actualized in society.

The new line of thought, then, may perhaps be said to cut the deterrent theory obliquely. It is, but only in a very modified way, reformatory. It is more truly preventive. It cannot be assumed that it would necessarily be favorable to the criminal from the criminal's own point of view. Of course,

even for the criminal, all may ultimately be for the best. But the claims of society are resolutely set against his claims, and, in so far as this idea is consistently carried out, a lapse in the direction of mere sentimentality is precluded. The idea of "doses" of punishment, which has been so frequently ridiculed, meant at least this: that there was a penalty which the criminal had to pay, and when he had paid it the debt was cancelled. On the deterrent theory any "dose" given him was for the good of all. This whole conception, be it right or wrong, is being strenuously attacked. Prevention, in its scientific sense, is swallowing it up. Hence the great stress laid upon those social reforms which are technically called penal substitutes; the assertion that such substitutes have never been properly studied until now, and the glorification of them at the expense of legal codes. Prevention is said to be primary, repression secondary, and in a wide and general sense this may be admitted. But if it be recognized, as it appears to be, that repression is, in its right place, nothing less than a social necessity, the reiteration of the comparison, when repression is under consideration, tends to confuse the issue. A social necessity which involves the liberties of men can never be called unimportant.

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